

## **FMLA – BACK TO BASICS – WHAT IS THE “12-MONTH PERIOD”?**

Oct 27, 2021

Eligible employees of employers covered by the Family and Medical Leave Act (“FMLA”) are entitled to take up to 12 weeks of FMLA leave during the applicable 12-month period for family and medical reasons, and up to 26 weeks of FMLA leave during the applicable 12-month period for military caregiver reasons. So, what is the applicable “12-month period?”

### **All Types Of Leave Except Military Caregiver Leave**

For all types of FMLA leave *other than* military caregiver leave (covered in greater detail below) – so, for leave needed due to the employee’s own or employee’s family member’s serious health condition, or for birth/placement of a child and to care for the child, or for qualifying exigency leave – employers are able to choose the definition of the “12-month period” from among the following options:

- The calendar year;
- Any fixed 12-month leave year, such as a fiscal year, a year required by State law, or a year starting on an employee’s anniversary date;
- The 12-month period measured forward from the date any employee’s first FMLA leave begins; or,
- A “rolling” 12-month period measured backward from the date an employee uses any FMLA leave.

There are pros and cons to each definition. For example, the calendar year or fixed leave year are likely easier to administer than the rolling backward leave year, but the calendar and fixed leave year definitions would permit “stacking” (where an employee could use 12 weeks of FMLA leave towards the end of the defined year and continue with an additional 12 weeks of FMLA leave at the beginning of the next year, for 24 weeks of leave in a row).

Once the employer selects which definition will be used, that definition should be stated in the employer’s FMLA policy (including any such policy included in a broader handbook or employee

manual), communicated accurately to employees in connection with leave requests (such as in the space indicated on the Notice of Rights and Responsibilities Form (WH-381, available [here](#)), and applied consistently and uniformly to all employees.

An employer may choose to change to one of the other “12-month period” definitions, but in making this change must: (a) give at least 60 days’ notice to all employees; and (b) ensure the transition occurs in such a way that employees retain the full benefits of 12 weeks of leave under whichever method would give them the greatest benefit.

## **Military Caregiver leave**

Military caregiver leave is available when an eligible employee needs to provide care to a covered servicemember who has a serious injury or illness. There is only one option for the 12-month period applicable to military caregiver leave: the 12-month period is measured forward from the date an employee’s first FMLA leave to care for the covered servicemember begins.

Employers should make sure that this distinction in the definition of the 12-month period is recognized by leave administrators, communicated to employees, and applied correctly.

## **Recommendations:**

- Ensure your FMLA policy: (a) states the selected definition of the 12-month period applicable to all types of leave other than military caregiver leave; and (b) states the accurate definition of the 12-month period for military caregiver leave.
- Ensure your FMLA leave administrator (including any third-party administrator) is familiar with the applicable definitions of the 12-month period as stated in the FMLA policy.
- Evaluate whether your chosen definition remains the best option for your company. If not, follow appropriate steps to change the definition with notice and transition time.
- Ensure the correct 12-month period is identified in communications to the employee, including in the Notice of Rights and Responsibilities (Form WH-381).
- Ensure the correct 12-month period is applied to employees’ leave requests and usage. Correct tracking of leave usage is imperative so that employees are given accurate information as to whether they have FMLA leave available and when their leave will be exhausted.

For any questions, please reach out to your Bryan Cave Leighton Paisner attorney contact.

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